NO. 97914-6

SUPREME COURT OF THE STATE OF WASHINGTON

GARFIELD COUNTY TRANSPORTATION AUTHORITY; KING COUNTY; CITY OF SEATTLE; WASHINGTON STATE TRANSIT ASSOCIATION; ASSOCIATION OF WASHINGTON CITIES; PORT OF SEATTLE; INTERCITY TRANSIT; AMALGAMATED TRANSIT UNION LEGISLATIVE COUNCIL OF WASHINGTON; and MICHAEL ROGERS,

Respondent-Plaintiffs,

v.

STATE OF WASHINGTON,

Petitioner-Defendant.

RESPONDENT/PLAINTIFFS' RESPONSE TO STATE'S EMERGENCY MOTION FOR STAY PENDING REVIEW

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I. INTRODUCTION

After the benefit of complete briefing, consideration of a large factual record, and a full morning of oral argument, the trial court below entered a preliminary injunction temporarily stopping implementation of I-976. The trial court undisputedly applied the correct legal standard and found the plaintiffs had met their burden of showing a likelihood of success on the merits that I-976 is unconstitutional, an immediate fear of invasion of plaintiffs' constitutional rights, and that the relative harms and balance of the equities weighed in favor of issuing an injunction.

The State's emergency stay motion, filed late on December 2, 2019, asks this Court in less than 48 hours, based on limited briefing, and without the benefit of oral argument, to overturn the preliminary injunction. That result would effectively give the State complete relief on the merits, at least for the months it will take for this Court to address the propriety of the issuance of the preliminary injunction and, regardless of the outcome of discretionary review, the period following remand of the case to the trial court for a determination of the merits. This Court has declined to grant such extraordinary emergency stays in the past, and should decline to do so here.

On the merits, the State's motion completely misses what is at stake on its pending request for direct, discretionary review. The issue on appeal, should the Court grant review, is whether the trial court abused its discretion

in granting the preliminary injunction, not whether I-976 is unconstitutional. That issue should inform the standard for granting the requested emergency stay.

Particularly when considering the standard of review, there is not a debatable legal question in this appeal. There is no debate that the trial court applied the correct legal standard in issuing the preliminary injunction. There is no debate that plaintiffs made an adequate showing of likelihood of success on the merits of their claim that the ballot title violated the subject-in-title requirements of article II, section 19 because it was misleading and deceitful to the voters. The language of the ballot title was clear: $30 vehicle license fees except for voter approved fees. There was nothing about the title that suggested a need to read the details of the initiative to learn whether that carve-out referred only to future voter approved fees, or that indicated that all statutes allowing for voter approval were being repealed. As the State admits, a misleading ballot title is unconstitutional.

Moreover, there is no debate that the trial court did not commit obvious (or any) error in weighing the relative harms and balancing the equities. If I-976 takes effect this week, it will decimate this State's transit and transportation infrastructure, a process that will progressively and exponentially worsen as time continues to pass. Absent a preliminary injunction, tens if not hundreds of millions of dollars that would be collected

under the status quo will be irretrievably lost, a point the State does not dispute. Respondents identified immediate impacts such as the loss of King County Metro service and the loss of local transportation benefit district revenues to cities across the state. The fact that Respondents cannot yet identify with precision the exact date of every impact, such as when riders in Garfield County will be denied transit services for medical appointments, important road projects will be cancelled or lose matching funding, or bus drivers will lose their jobs, does not demonstrate error by the trial court. As the trial court observed, this raises a question as to which Plaintiffs will suffer the harm, not whether it will occur. The State speculates without any evidence that other funding might arise from unspecified sources, but this hardly negates the numerous, detailed declarations describing real and immediate impacts including most significantly on seniors, the disabled, and other vulnerable members of our communities. On the other hand, if I-976 is ultimately upheld, refunds can be issued through an established statutory procedure. A comparison of these harms further militates against a stay.

As the State acknowledges, the court also considers whether granting the stay is necessary to preserve the "fruits" of an appeal that would otherwise be lost pending review. Indeed, this is the primary function of a stay, especially a stay before review is even granted. As noted above, there is no danger of that occurring here because taxpayers will be entitled to a

refund should one become warranted. In contrast, Respondents would lose the fruits of the appeal if a stay were granted, primarily because revenue foregone in the absence of an injunction could never be recovered.

The State seems to argue the novel and far-reaching proposition that there is some right for voters who supported a ballot measure to have even an unconstitutional initiative implemented until there is a hearing on the merits. No case supports that proposition. It is wrong and should be rejected.

Finally, the Court should consider that the public interest is best served by a quick resolution of the Respondents' constitutional claims. That can only be achieved by denying the stay and the request for interlocutory review and allowing the trial court to promptly resolve the merits, a process it has already commenced in calling for a briefing schedule. At that point, direct expedited review by this Court would be appropriate. Appealing a motion for preliminary injunction only delays that for months.

The State does not meet the standard for an emergency stay of a preliminary injunction. The State's motion should be denied.

II. STATEMENT OF CASE

A. Facts Relevant To Response.

1. Transportation Funding in Washington and Transportation Benefit Districts.

Washington municipalities have limited revenue options to fund public transit programs and critical infrastructure projects and maintenance. App. at 317-333. Many of the revenue sources the State notes generate limited revenue, have restricted uses, or are dependent on State funding, a source that will be extremely limited going forward due to the impacts of I-976. *Id*. Taken together, the revenue sources currently available to cities and counties are woefully insufficient to fully fund a functional, reliable, safe and equitable regional transportation network. App. at 370-375. To make up some of the difference, the State funds the Multimodal Account, which supports a variety of local programs ranging from lifeline transportation services utilized by disadvantaged populations to upkeep of major capital infrastructure, such as bridges in crisis condition. *See* RCW 47.66.070. This account is funded with, among other sources, vehicle-related license fees and permits, many of which I-976 reduces or eliminates. App. at 317-333, 334-357.

Another key revenue source is the vehicle license fee ("VLF") imposed by local transportation benefit districts ("TBDs"). *See generally* ch. 36.73 RCW. Washington cities, towns, and counties are authorized to establish TBDs within their jurisdiction so as to generate revenue for local

transportation improvements, including specifically public transit. *Id*. 62 cities and counties have taken advantage of this authority and imposed a non-voted VLF only within their jurisdiction. App. at 29. This includes Seattle. App. at 30. In 2014, the Seattle electorate voted overwhelmingly to increase their TBD's VLF by $60 and exclusively "fund Metro Transit service" with that voted portion of the VLF. *Id*. With this revenue, Metro provides 175,000 service hours within the greater Seattle area, of which the County has leveraged into the equivalent to 350,000 service hours. *See* App. at 34-36,102-169. I-976 entirely eliminates authority for any VLF – whether voter-approved or otherwise.

2. I-976 Purports to Cap Vehicle License Tabs at $30 – But Does Much More.

The self-proclaimed title of I-976 is "Bring Back Our $30 Car Tabs," with a stated purpose to "limit state and local taxes, fees, and other charges relating to motor vehicles." App. at 30-33. But, I-976 would operate to deceptively do much more than limit "car tabs" to $30. Instead, it contains a panoply of unrelated subjects cobbled together to generate voter support, and, consistent with the State's interpretation, does not actually limit registration fees to $30. Rather, the minimum anyone would pay is actually $43.50. *Id*. Importantly, if implemented as intended, I-976 will cost the taxpayers far more in future debt service and delayed, but critical road and bridge maintenance than it saves in the near term. *See* App.

at 370-375, 697-699. This result is directly contrary to the State's suggestion that other revenue can simply be used to fill this gap.

I-976 combines a reduction in state vehicle registration fees with elimination of locally voted registration taxes. App. at 30-33, 687. And, despite a misleading title, I-976 repeals local voter authority to impose vehicle fees and does not leave local voters with a means to impose these fees in the future. *Id*. I-976 also eliminates the electric vehicle mitigation fee, a fee "separate and distinct from other vehicle license fees." *Id*. It eliminates a vehicle weight fee and authorizes administrative rulemaking for vehicle weight determination. *Id*. It eliminates the sales tax on vehicle purchases, a tax unrelated to the cost of registration or renewal and a tax administered by an entirely different State agency, the Department of Revenue, not the Department of Licensing. App at 43. Contrary to an implied goal of less government spending, I-976 has a purported requirement that Sound Transit repay outstanding bonds, which would necessitate significant additional, new debt. *See* App. at 697-699. I-976 also has a change in the valuation schedule only used by Sound Transit and has a reduction in Sound Transit's authority to issue future MVETs should it not repay its bonds, along with effective dates that depend on Sound Transit discretionary debt management decisions. *See* App. at 30-33, 697-699.

3. Brief Overview of Harms

As described below, there are a host of measurable and irreparable harms Plaintiffs will suffer if an injunction is not in place pending a final decision. For example, because there is **no other source of available revenue**, the County would need to commit to a reduction in service by 110,000 hours, or the equivalent to 82 full-time employees no later than December 9, 2019. *See* App. at 102-169, 701-762. That devastating loss of service and wages cannot be retroactively mitigated. *Id*.

Moreover, Seattle would forever lose any VLFs not collected during the pendency of this case. *See* App. at 171-173. While the State places much emphasis on the City's VLF reserve, that money does not supplant the permanent loss of revenue and, once it is spent to backfill for lost VLF revenue, it can never be recovered and spent on its originally intended purpose: the provision of bus service in the future. Even assuming Seattle can use the entire reserve to continue funding Metro Transit service, the County will still be in the position of cutting service in 2020. *See* App. at 701-762. This only delays the cuts by a few months. Using sale proceeds from capital assets or another part of the transportation budget would merely cause harm in another way. *See* App. at 88-91. All of those dollars have uses to support public programs.

There will also be a host of programs and projects decimated by delayed Multimodal account funding. App at 764-780. All of the Plaintiffs

will be irreparably harmed by these delays, which means, contrary to the State's assertions, it is in the Plaintiffs best interest to expedite a final decision so as to confirm funding immediately.

B. Procedural Posture.

On November 13, Plaintiffs filed their complaint for injunctive relief in King County Superior Court. App. A at 2-18. The Parties agreed on a briefing schedule, and Plaintiffs filed their motion for a preliminary injunction on November 18. App. B at 26-69. In support of the motion, Plaintiffs submitted declarations from sixteen public officials and affected private citizens detailing the grave harms Plaintiffs would suffer if I-976 were to take effect as scheduled on December 5, 2019. App. B at 71-279; 366-435.

Oral argument was held on November 26 in front of the Honorable Judge Marshall Ferguson. The hearing lasted nearly three hours, including extensive questioning of both sides by the court on the issues of article II, §19 and article II, §37 violations of the State Constitution, and the harms Plaintiffs would face if the initiative were implemented. Regarding article II, §19, the State argued below that the ballot title was not misleading, despite assuring voters that voter-approved charges would remain, because there were "several ways" voters could approve of future charges in the future. *See* App. C at 461. When asked how stripping the mechanism for voter approval of such fees did not render the title materially misleading,

the State simply responded "I'm not quite sure how to respond to that. That is their argument" before offering vague assurances that "every bill can be changed in the future." PVRP at 44-45. The State then explicitly acknowledged that a materially misleading ballot title "would vitiate the initiative." PVRP at 45; lines 13-17.

The court granted Plaintiff's motion for preliminary injunction on November 27. App. G at 831-38. The court found that the Plaintiffs would suffer imminent, irreparable harms if the initiative went into effect December 5, including a 110,000 service hour cut for King County Metro on December 9, losses in the tens of millions of dollars for the City of Seattle in VLF funding in the next two years, and other devastating effects to municipalities due to slashes to the State's Multimodal Account. App. G at 832-34. This lost revenue, the court correctly pointed out, could not be made up at a later point. App. G at 833; lines 10-12.

The court concluded as a matter of law that Plaintiffs met their burden to show they had a clear legal or equitable right, a well-grounded fear of immediate invasion of that right, and that implementation of the initiative may result in substantial injury. App. G at 835-36. Of the numerous constitutional infirmities Plaintiffs focused on in their briefing and at oral argument, the trial court chose to focus on the misleading nature of the ballot title: "[A]all existing voter approved charges are apparently extinguished by 1-976, even though the ballot title suggests that all voter

approved charges, past or future, survive I-976." App. G at 835; lines 11-13. The court further explained that the implementation of an unconstitutional initiative, "even if approved by a majority of voters, would be an invasion *per se* of Plaintiffs' rights under the Washington Constitution." App. G at 835-36. Finally, in balancing the equities to determine whether injunctive relief was warranted, the court found "the harms to Plaintiffs resulting from the implementation of I-976 outweigh the harms faced by Defendant State of Washington and the public if implementation of I-976 is stayed." App. G at 836-37. Though the court noted that an injunction would require drivers to continue to pay all currently-imposed vehicle license taxes and fees, it stressed that there was an existing mechanism for voters to receive refunds if necessary. App. G at 836. The court therefore enjoined the State from implementing or enforcing the provisions of I-976, and ordered the Parties to provide the court with a proposed scheduling order by December 5, 2019. App. G at 837-38.

Instead of proceeding under an expedited schedule in the trial court, the State began working on an Emergency Motion for Stay Pending Review on November 27. *See* Decl. of Eldred at §2. However, the State provided notice of this motion only on the same day that it was filed with this court on December 2. *Id.* AT §4.

III. THIS COURT SHOULD DECLINE TO GRANT THE STATE FULL RELIEF ON THE MERITS OF ITS APPEAL UNDER THE PRETENSE OF AN "EMERGENCY STAY".

Under the guise of a motion to stay, the State asks this Court to grant it full relief on the merits from an abuse of discretion-based interlocutory appeal without an opportunity for fair and actual consideration of its appeal. The State's motion amounts to a request for this Court to grant discretionary review, grant direct review, and dissolve the trial court's properly granted preliminary injunction, all in less than 48 hours. The State's request is premature and does not allow sufficient time for a fair and deliberative process.

The State's motion is premature because the trial court is still conducting a comprehensive expedited review of the merits. For example, the trial court record is comprised of more than 1,000 pages of materials just from the preliminary injunction, and the trial court conducted a nearly three-hour hearing on the preliminary injunction. The trial court's process has been fair and is moving forward with deliberate speed toward an anticipated conclusion at the trial court in early 2020.[1] The trial court has

[1] Before the Superior Court, the State represented the likelihood that motions for summary judgment could be heard by the court "in the next weeks or month or two." 11/26/2019 Partial Verbatim Report of Proceedings ("PVRP") at 35:16-17. Plaintiffs will be asking to set this hearing in early 2020 within the time-frame already suggested by the State. An appeal could not be entertained during this short time period.

already directed the parties to confer on a briefing schedule for the merits and to submit their proposed order by December 5.

By contrast, the State's emergency motion for a stay is both unfair and hasty. Although the Attorney General announced through Twitter on November 27 that the State intended to appeal the preliminary injunction ruling to this Court, no effort was made to contact opposing counsel until December 2, much less provide the required notice of an emergency motion to stay under RAP 17.4(b), until the same day the brief was filed. Decl. of Eldred. at §4. Nor was there any effort in the tweet or otherwise to specify that the State would be seeking a stay under RAP 8.1. *Id.* at §2. The materials the State belatedly submitted to this Court at the end of the court day on December 2, 2019 failed to disclose the multiple objections from the Plaintiffs that the State was failing to timely file this appeal. *Id.* at §5. This resulted in the Respondents having less than 24 hours to prepare and file an opposition to the motion.

This Court should decline the State's attempt to so substantially truncate the appeal process (in its own favor) so as to render it all but meaningless. In the case of *Evans v. Broom*, No. 75970-7 (2004), Commissioner Crooks denied a similar request to this Court for an emergency stay. The case involved the question of whether a local initiative exceeded the scope of the initiative power or conflicted with state law. The trial court enjoined placement of the initiative on the ballot, but the Court

of Appeals reversed. Commissioner Crooks reasoned that a stay could not lie on an emergency basis:

> The emergency stay sought by the petitioners would as a practical matter amount to a reversal of the Court of Appeals order. But this court ought not reverse the Court of Appeals, especially in a case of this sort, unless the full court has been able to give the matter careful and deliberate consideration. That quality consideration cannot possibly be afforded in this instance in light of the severe time constraints imposed by election deadlines.

See Eldred Dec., Ex. C (Order; citing *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 53, 65 P.3d 1203 (2003) (denying writ request where there was "insufficient time to engage in the deliberations that a case of this magnitude demands…."); *see also Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 208, 995 P.2d 63 (2000) (noting denial of motion for emergency stay of preliminary injunction pending decision on discretionary review).

Kucera offers another important reason for this Court to defer its consideration of this case for a short period until the trial court completes its ruling on the merits, rather than weighing in now on an emergency basis. In *Kucera*, the motion to stay was filed in August 1999, but the Court did not rule on the motion for discretionary review until November, or resolve the preliminary injunction appeal until March 2000. Such a process is not the most effective or expeditious way for this Court to resolve the important issues that the trial court and the parties are developing for its consideration. The Ninth Circuit has observed a similar concern with preliminary injunction appeals:

> Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits. Furthermore, in many cases, appeal of district courts' preliminary injunctions will result in unnecessary delay to the parties and inefficient use of judicial resources. We think it likely that this case, for instance, could have proceeded to a disposition on the merits in far less time than it took to process this appeal.

Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982).

The grant of an emergency "stay" with the effect of dissolving the trial court's preliminary injunction without meaningful briefing, argument or the consideration of the full court, would be highly inequitable and would substantially delay the ultimate determination of the issues. The Court should decline to exercise its discretion for this reason alone.

IV. THE STATE HAS FAILED TO MEET THE RAP 8.1(B)(3) REQUIREMENTS FOR A STAY PENDING APPEAL OF THE SUPERIOR COURT'S PRELIMINARY INJUNCTION.

This Court should also deny the State's motion because it does not meet the criteria for a stay under the RAPs and applicable case law. On extremely shortened time, the State is seeking emergency interlocutory review directly from this Court and a stay of the Superior Court's discretionary issuance of a preliminary injunction. Determination of the

State's Emergency Motion for Stay Pending Review is evaluated in this context using the RAP 8.1(b)(3) criteria:

> In evaluating whether to stay enforcement of such a decision, the appellate court will (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed.

See also Moreman v. Butcher, 126 Wn.2d 36, 42 n.6, 891 P.2d 725, 729 (1995) ("[T]he appellate court should weigh the factors set forth in RAP 8.1(b)(3) with care."). The State has the full burden to support issuance of a stay pending its proposed interlocutory appeal.[2]

A. The Questions Presented Through Interlocutory Review of a Preliminary Injunction Differ From the Merits Questions That Would Arise Upon Reviewing a Final Order.

Because the State is seeking interlocutory review of a preliminary injunction, the "debatable issues" question is not addressed to the ultimate merits of Plaintiffs' case, but to the discrete question of whether the trial curt abused its discretion in ruling that grounds for a preliminary injunction exist. To obtain a preliminary injunction, Plaintiffs need only show a

[2] The State cites *Boeing v. Sierracin Corp.*, 43 Wn.App. 288, 291, 716 P.2d 956 (1986) for the proposition that RAP 8.1(b)(3) criteria are evaluated "using a sliding scale approach" where a deficiency on one factor can be overcome by an exceptional showing on another factor. State's Motion at 7. But this is wrong. As Tegland points out, RAP 8.1(b)(3) amendments were designed to abandon the "sliding scale" approach represented in *Boeing Co. v. Sierracin Corp.* and other similar cases. 2A Wash. Prac., Rules Practice RAP 8.1 at §5 (8th Ed.)

"likelihood that the moving party will prevail on the merits" along with other requirements. *Rabon v. City of Seattle*, 135 Wn.2d 278, 285, 957 P.2d 621 (1998). As such, the State's claim that its defense of I-976 was "plausible" is of no moment. The "likelihood to prevail on the merits" standard does not require Plaintiffs to disprove all arguments or meet the higher standard applicable to a permanent injunction; otherwise a preliminary injunction would never issue in a constitutional case. *See Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982) ("Review of an order granting or denying a preliminary injunction is therefore much more limited than review of an order involving a permanent injunction where all conclusions of law are freely reviewable."). Rather, Plaintiffs' showing that their argument is a likely winner empowers the Superior Court to exercise its discretion to issue a preliminary injunction if the other requirements are satisfied.[3]

[3] On the harm caused by I-976, the State makes no effort in its motion to challenge the Superior Court's extensive findings of fact, which are verities for purposes of this motion. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002) ("Unchallenged findings are verities on appeal."). The State presents no legal reason – like sufficiency of the evidence – to disregard the Superior Court's findings of fact. *See Rabon v. City of Seattle*, 135 Wn.2d 278, 286, 957 P.2d 621, 624 (1998) (When reviewing a preliminary injunction, a reviewing court is limited to evaluating "purely legal issues in assessing the propriety of a decision to grant or deny a preliminary injunction.").

B. The Debatable Issue Inquiry Must Account for the Tenuous Procedural Posture of the State's Request for Interlocutory and Direct Review.

The State's ability to meet the RAP 8.1(b)(3) criteria must also be evaluated through the dual lenses of interlocutory review and direct review. An issue is not "debatable" when the realistic chances of review being accepted have not even been discussed by the State. Here, the State does not have an appeal as of right, but must meet the well-known RAP 2.3(b) criteria before its case can even be heard – "obvious error which would render further proceedings useless," "probable error" that "substantially alters the status quo or substantially limits the freedom of a party to act," or "so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court." Further, for direct review by this Court, the State must further meet the requirements of RAP 4.2(a) in the context of a *preliminary* ruling from the Superior Court. The State devotes no argument to any of these points, nor has it yet filed a motion for discretionary review or a statement of grounds for direct review. There can be no "debatable issues" until the State has met its burden to demonstrate that an appellate forum exists in which to debate them, *i.e.* that this Court will accept interlocutory and direct review.

C. A RAP 8.1(b)(3) Debatable Issue Is Less Likely Under the Abuse of Discretion Standard.

The State has a further hurdle in demonstrating a "debatable" issue because it seeks review of a preliminary Superior Court ruling that falls wholly within the abuse of discretion standard. *See, e.g., Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000)("A trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion."); *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621, 623 (1998) (same).

Judicial discretion presents a very high hurdle against the State's burden to establish a debatable issue. *See generally T.S. v. Boy Scouts of America,* 157 Wash.2d 416, 423-424, 138 P.3d 1053,1056 - 1057 (2006) ("An appellate court will find an abuse of discretion only 'on a clear showing' that the court's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'"). Under abuse of discretion, it is not enough for the State to show that the appellate court or other judges might have reached a different decision. *See Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982) ("[U]nless the district court's decision relies on erroneous legal premises, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case."). The State's failure to present any colorable

argument demonstrating an abuse of discretion precludes a finding that it has presented a debatable issue.

D. The State Fails to Demonstrate that a Stay Pending Appeal is Necessary to Preserve Either The Fruits of Its Appeal of the Status Quo.

The State fails to meet additional criteria for issuance of a stay pending appeal reaffirmed by this Court in *Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196, 1206 (1985), which the State acknowledges in its motion. State's Motion at 7. In *Purser*, this Court pointed out that:

> Whether a stay pending appeal should be granted depends on (1) whether the issue presented by the appeal is debatable, and (2) whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation. *See Shamley v. Olympia,* 47 Wash.2d 124, 286 P.2d 702 (1955); *Kennett v. Levine,* 49 Wash.2d 605, 304 P.2d 682 (1956).

104 Wn.2d at 177. *See also Inman v. Netteland*, 95 Wn. App. 83, 88, 974 P.2d 365, 368 (1999) (discussing same principle).

From *Purser* and its favorable citations to both *Shamley* and *Kennett*, a stay pending appeal is available only when the moving party demonstrates that a stay is necessary to preserve the fruits of the appeal *and* to maintain the status quo. *See Shamley v. City of Olympia*, 47 Wn.2d 124, 126, 286 P.2d 702, 703 (1955) (Issuance of a stay pending appeal "will be exercised with caution, **and only in those cases where such an order is *necessary* to preserve the fruits of the appeal in the event it should prove successful**."; emphasis added.); *Kennett v. Levine*, 49 Wn.2d 605, 606–07, 304 P.2d 682, 684 (1956) (A stay is appropriate only where "the equities of

the case must require that the *status quo* of the litigants be maintained."). Certainly a stay should be denied in a case like this one, where the State's motion would both destroy the fruits of the appeal for Respondents, and at the same time upend the status quo.

First, a stay has nothing to do with maintaining the "fruits" of the State's proposed interlocutory appeal. If interlocutory review is accepted and the State prevails in its defense of I-976, then the initiative becomes effective and lower motor vehicle fees and certain taxes will be collected in accord with the initiative provisions.[4] But this does not give the State any relief that it does not already have under the Superior Court's preliminary injunction. The State's sole concern is the overcollection of fees and taxes while the preliminary injunction is in place. But the preliminary injunction ensures that "[a]ny municipality or political subdivision that accepts such funds while this Order is in effect, including those that are not parties to this lawsuit, do so subject to the likelihood that refunds of overpayments may be required should the State ultimately prevail in this action." App. G at 837-38.

[4] We note, however that the State's chances of success on the merits is ultimately very low due to the strength of the plaintiffs' constitutional challenge and because only certain claims were presented to the Superior Court to obtain the preliminary injunction. Other claims, including the impairment of contracts, have not yet been litigated. This is another reason why piecemeal review of this case makes no sense.

As a result, this is not a case where a stay is necessary to preserve the fruits of appeal. *See, e.g. Columbian Pub. Co. v. City of Vancouver*, 36 Wn. App. 25, 27, 671 P.2d 280, 282 (1983) (Stay appropriate because City would be deprived of fruits of its appeal if it were required to disclose documents pending appeal); *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 292, 716 P.2d 956, 958 (1986) (Absent stay, appellant would be forced out of business during the appeal.). To the contrary, given the "preliminary" nature of a preliminary injunction, the State faces no permanent injury merely because I-976 will not take effect on December 5. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (A preliminary injunction causes no irreparable harm to the Government because "[i]t may yet pursue and vindicate its interests in the full course of this litigation."). The only thing at risk to the State due to the preliminary injunction is money and that is easily remedied through a refund should the State prevail in its interlocutory claims.

Second, the State cannot meet requirements for a stay pending appeal because a stay would alter the status quo, not maintain it. The State, in a declaration submitted by its attorney, claims that the "preliminary injunction disrupts the status quo." Copsey Decl. ¶9. This reasoning is faulty because the very next sentence explains that, under the preliminary injunction, "the State will be compelled to *continuing collecting*" (sic) the fees and taxes that would otherwise be eliminated by I-976. *Id.* Of course,

"continuing" to do the same thing is precisely the definition of maintaining the status quo. The "**status quo** ante" means the "'last actual, peaceable, noncontested condition which preceded the pending controversy.'" *Gen. Tel. Co. of the Nw. Inc. v. Wash. Utils. & Transp. Comm'n,* 104 Wn.2d 460, 466, 706 P.2d 625 (1985) (*citing State ex. rel. Pay Less Drug Stores v. Sutton,* 2 Wn.2d 523, 529, 98 P.2d 680 (1940)).

In fact, through other litigation, the State has repeatedly argued that the status quo is best preserved by preventing the effectiveness of a new law or rule via a preliminary injunction. As the Court of Appeals recently held in a case regarding a local initiative designed to effectively repeal a municipal ordinance:

> The status quo was that the Ordinance was in effect. The initiative sought to alter the status quo. Its placement on the ballot was contingent upon satisfying the legal requirements for an initiative. Whether it had done so had not been established and was the subject of the litigation.

Burien Communities for Inclusion v. Respect Washington, No. 77500-6-I, 2019 WL 4262081, at *7 (Wash. Ct. App. Sept. 9, 2019). Similarly, In *Washington v. Trump*, the State argued that the status quo was preserved through a temporary restraining order that prevented implementation of an Executive Order pending the District Court's consideration of its constitutionality. Dec. of Eldred, Ex. B, at p. 8. Likewise, in *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 431 (9th Cir. 2019), the State of Washington and others obtained a preliminary injunction

precluding the effective date of new agency rules, which the Ninth Circuit later affirmed because the "injunction only preserves the status quo until the district court renders judgment on the merits based on a fully developed record." Because the State has no colorable argument that implementation of I-976 is necessary to maintain the status quo and implementation actually disrupts the status quo, the State cannot obtain a stay pending appeal.

V. THERE IS NO DEBATABLE ISSUE BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT I-976 WAS LIKELY UNCONSTITUTIONAL.

A stay is also unwarranted because there is no debatable abuse of discretion as to Plaintiff/Respondents' likelihood to prevail on the merits. Although the preliminary injunction was heard just last Tuesday, the State has already changed several of its arguments. These new arguments, which are discussed below, cannot establish error or an abuse of discretion. *See Brower v. Pierce Cty.*, 96 Wn. App. 559, 567, 984 P.2d 1036, 1040 (1999) ("We will not consider arguments that are made for the first time on appeal."). Under either version of the State's case, Plaintiffs have demonstrated beyond debate that I-976 likely violates the Washington Constitution. Initiatives, like other legislative acts, must comply with the Washington Constitution. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000) ("*ATU*"). Thus, even if "an initiative passes by the majority of voters, it will be struck down if it runs

afoul of Washington's constitution." *City of Burien v. Kiga*, 144 Wn.2d 819, 822, 31 P.3d 659 (2001).

A. The I-976 Ballot Title, Which Affirmatively Misleads Voters, Violates Article II, Section 19 of the Constitution.

I-976 violates the "subject in title" rule of Article II, section 19 of the Washington Constitution because it was presented to voters under a deceptive ballot title. The "purpose" of the subject-in-title requirement is to "notify members of the Legislature and the public of the subject matter of the measure." *ATU*, 142 Wn.2d at 207. The "particular importance" of this requirement in the "context of an initiative" is that voters often do not reach the "text of a measure or the explanatory statement," but "instead cast their votes based upon the ballot title." *Id.* at 217. Under normal circumstances, a ballot title survives constitutional scrutiny when it gives "notice which would lead to an inquiry into the body of the act" or indicate "the scope and purpose of the law to an inquiring mind." *Id.*

A much stricter rule applies, however, when a ballot title is misleading and false. As the State conceded below, "material representations in the title must not be misleading or false." App. C at 458. A ballot title that affirmatively misleads voters presents an *a priori* constitutional violation that invalidates the initiative. *See Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 660, 278 P.3d 632 (2012) ("[T]he material representations in the title must not be misleading or false, which would thwart the underlying purpose of ensuring

that no person may be deceived as to what matters are being legislated upon." (internal quotations omitted)); *Howlett v. Cheetham*, 17 Wash. 626, 635, 50 P. 522 (1897) ("[A] title which is misleading and false is not constitutionally framed, and will vitiate the act."). In fact, during arguments below, the State further conceded that a materially misleading ballot title invalidates the entire initiative:

> THE COURT: Does the state agree that if the court were to conclude that the ballot title were materially misleading that that would vitiate the initiative?
>
> ASG COPSEY: Yes, under the cases that have been cited.

PVRP at 45: 13-17.

I-976's ballot title affirmatively misled voters by representing that the $30 limit on license fees had no application to voter-approved charges. It expressly states that voter-approved charges in excess of $30 would be retained, or that at least, voters would retain the authority to approve such vehicle charges:

> Initiative Measure No. 976 concerns motor vehicle taxes and fees.
>
> This measure would repeal, reduce, or remove authority to impose certain vehicle taxes and fees; ***limit annual motor-vehicle-license fees to $30, except voter-approved charges***; and base vehicle taxes on Kelley Blue Book value. Should this measure be enacted into law?

App 305. (emphasis added). The ballot title describes the world that "would" be created by I-976, which supposedly includes both the

elimination of certain taxes and fees to establish a $30 cap, but also the ability to exceed that cap by voter approval for crucial public projects.

Such a ballot title affirmatively misled voters by promoting the belief that I-976 would not impede local votes to exceed the $30 cap for important projects, and would allow such votes in the future; neither proposition is remotely true. In fact, statutory repealer and amendment provisions in multiple sections of I-976 actually eliminate any possibility of such a vote. The State does not dispute that no mechanism for voter approval of license fees in excess of $30 survives, nor does I-976 create any new mechanisms for voter approval. *See* State's Motion at 11-15. Despite repeated pressing by Plaintiff/Respondents, the State has cited no provision of law that "would" exist when I-976 becomes effective that would allow voter approval in excess of the $30 cap.[5] Thus, a voter who cast his or her vote based on the ballot title would have been affirmatively misled to believe that voters retained their authority to exceed the $30 cap, and would have no notice of the broad repeal of local voter control and authority, and. This is not only unconscionable, it is unconstitutional under article II, section 19.[6]

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[5] In proceedings below, the State admitted that all voter-approved vehicle fees are eliminated by I-976. App. C. at 447-48. At one point, it claimed that the general initiative process might be a way for voters to exceed the $30 cap in the future, but it has wisely abandoned this argument on appeal.

[6] Even the initiative's sponsor, Tim Eyman, freely acknowledged this deceit and fatal problem with I-976. In an interview after the election, Tim Eyman said the clear intent of his measure was to get rid of all car taxes and fees

The State dances all around this problem, but cannot avoid the misrepresentations of the I-976 ballot title or the constitutional implications of this infirmity. The State glibly claims that "it is entirely appropriate for the ballot title to reference voter-approved charges as an exception to the $30 cap on 'motor-vehicle-license-fees,' *because I-976 provides for that exception*." State's Motion at 12 (emphasis added). But this statement is even more misleading than the ballot title itself. The State cites only to section 2 of I-976, which defines motor vehicle license fees to exclude "charges approved by voters after the effective date of this section" – but this section nowhere "provides" a mechanism to facilitate voter approval even while other sections of I-976 actively repeal existing options to vote. Thus, the ballot title remains entirely deceitful by informing voters that "[t]his measure ***would*** repeal, reduce, or remove authority to impose certain vehicle taxes and fees" in order to achieve its $30 cap, "***except voter-***

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above $30, including voter-approved ones. He confirmed, for example, that it cancels Seattle's $60 voter-approved car tab that pays for increased bus service, that it also bars the city from asking voters to approve any car fees in the future, and also (attempts) to repeal Sound Transit's authority to collect voter-approved vehicle taxes. Eyman's excuse: **"I didn't write the ballot title," he said. "The attorney general's office did. The attorney general chose to describe it that way."** App. B at 207-11 **(***Was the language voters saw on their ballots for Initiative 976 wrong? Sure seems like it*, Seattle Times, Nov 16, 2019 (emphasis added), attached to Segal Decl., Ex. C). Even this statement is misleading, however, as the language of the ballot title is drawn from the language of section 1 of the initiative.

approved charges." App. 305 (emphasis added). No such vote for local or state taxes or fees is possible under I-976.

The State's excuse that it had only 30 words for the ballot title rings even more hollow. State's Motion at 12. The fact that a title satisfies the statutory word length does not render it constitutional. Here, the title is false and misleading precisely because it used too many or the wrong words, most notably the affirmative misrepresentation that the measure would "limit annual motor-vehicle-license fees to $30, ***except voter-approved charges."*** (Emphasis added). In this instance, it took fewer words, not more, to tell the truth. Even if it was necessary to remove words elsewhere, there are plenty of options, such as removing "vehicle" in the clause "and base vehicle taxes on Kelley Blue Book value," or using the phrase "and calculate vehicle taxes using Kelley Blue Book".

Nor can the State credibly claim that its false promise of a voter approval option placed voters on inquiry notice. First, as the State has already admitted, a false ballot title entirely vitiates the initiative without placing any burden on voters to uncover the deceit. Second, any voter reviewing I-976 would see only references to voter approval that mask the vague repeals or amendments of statutes actually authorizing such votes. It was the duty of the State under Article II, section 19, to provide an accurate ballot title without false and misleading representations, not the duty of voters to uncover the ballot title's deceit.

Finally, the State's claim that the ballot title was accurate because "motor-vehicle-license fees" are "a specific type of fee collected only by the State" is wrong. Even if this argument had any merit, it would not matter because I-976 leaves no room for voter approval of state license fees in excess of the $30 dollar cap. Thus, the misrepresentation of the ballot title remains.

But the State's argument is incorrect on a more fundamental level. It relies on other statutory definitions related to vehicle license fees and similar phrases *to the complete exclusion of I-976's specific definition* of "state and local motor vehicle license fees". The State argues that the voter approval exception applies to state license fees only, not local charges like TBD VLFs. The definition provided in the initiative, however explicitly applies to both "[s]tate **and local** motor vehicle license fees." App. B at 287. (emphasis added). Whether license fees go to the TBD or the State does not matter because "motor vehicle license fees" are broadly defined in section 2 as "the general license tab fees paid annually for licensing motor vehicles." *Id.*, § 2(2). Both are assessed at the same time annually and collected by the Department of Licensing for the privilege of operating a vehicle. Because the I-976 definition of "motor vehicle license fee" controls and encompasses all the various state and local fees paid annually for licensing motor vehicles, the State's claim that the ballot title applies only to the state portion of the license fee is neither cogent, nor correct.

The deceitfulness of the ballot title does not end here. The title plainly represents a $30 cap on vehicle license fees. But to avoid invalidation under article II, section 37 due to the implied amendment of other statutes, including a large number of vehicle license fees under chapter 46.17 RCW, *see* below, the State argued before the Superior Court that the annual license fees in chapter 46.17 RCW will continue to apply in excess of the $30 cap. App. C at 464; PVRP at 26-28. This is a flawed reading of the initiative, which is to be liberally construed to "limit state and local taxes, fees and other charges relating to motor vehicles" to the promised $30 cap. App. 303 (I-976, §§14, 1). The State derives its argument from its misreading of sections 3 and 4 of I-976, which amends statutes where pre-existing language preserves "any other fee or tax required by law." Of course, the "any other fee or tax required by law" language merely begs a question that is now answered by the broad scope of "state and local motor vehicle license fees" under the initiative's section 2 definition. There is no serious debate that the various chapter 46.17 licensing fees fall within the broad scope of fees covered by the I-976 definition.

Regardless, this debate is somewhat academic because either way – whether I-976 covers the chapter 46.17 RCW license fees or not – the initiative plainly violates the Constitution. If I-976 is narrowly construed (contrary to its terms) to allow annual license fees well in excess of the represented $30, then it violates subject-in-title requirements through yet

another falsehood. However, if I-976 amends other statutes encompassing the additional fees in chapter 46.17 RCW by implication, then the initiative is unconstitutional under article II, section 37. *See* below. Because the State's inconsistent positions could not be reconciled before the Superior Court and cannot be reconciled now, I-976 must be invalidated.[7]

In sum, the State fails to explain any non-deceitful meaning for the ballot title's claim that voters can exceed the $30 cap, or that license fees are capped at $30. At the very least, there is no "debatable issue" that the I-976 ballot title is likely unconstitutional.

B. This Court Should Affirm the Trial Court on Alternative Grounds.

Tellingly, in the effort to make the issues on appeal seem "debatable," the State fails even to mention most of the grounds that Plaintiff/Respondents presented to the trial court as to how I-976 violates the Constitution. While the State's motion focuses solely on the article II, section 19 "subject-in-title" arguments, the trial court's ruling could and should be affirmed on multiple alternative grounds. *See Matter of Disciplinary Proceeding Against Placide*, 190 Wn.2d 402, 426, 414 P.3d 1124, *cert. denied sub nom. Placide v. Supreme Court of Washington*, 139 S. Ct. 642, 202 L. Ed. 2d 492 (2018) ("This court may affirm a lower court's ruling on any grounds adequately supported in the record."). As detailed

[7] The title also fails to mention other substantial subjects of I-976, most notably the sections directed toward Sound Transit and its bonds.

below, I-976 violates several other requirements of the Washington Constitution, including the article II, section 19 single subject rule and the article II, section 37 improper amendment rule.

1. I-976 Violates The Single Subject Rule.

In addition to the subject-in-title requirement, I-976 also violates article II, section 19's single subject requirement. Article II, section 19 provides that "[n]o bill shall embrace more than one subject." This requirement prevents impermissible "logrolling" or pushing legislation through by attaching it to other legislation. *See Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 628, 62 P.3d 470 (2003). In evaluating a potential single subject violation, courts typically first consider whether an initiative's ballot title is "general or restrictive." *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 828, 31 P.3d 659 (2001). Initiatives with restrictive titles violate the single-subject rule where an initiative's provisions are "not fairly within the ballot title." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 209, 11 P.3d 762 (2000) ("*ATU*"). Initiatives with general titles violate the single-subject rule if "rational unity" does not exist among "all matters" addressed in the initiative and expressed "in the title." *Kiga*, 144 Wn.2d at 825-26. In particular, courts have typically held that initiatives violate the single subject rule where one subject is long-term and "continuing" in nature, i.e., a general subject, and a second subject involves a onetime event, i.e., a specific subject. *See, e.g., Wash. Toll Bridge Auth.*

v. State, 49 Wn.2d 520, 523-25, 304 P.2d 676 (1956) (single-subject rule violated where initiative's first purpose was authorization of a state agency to operate all toll roads (general subject), whereas second purpose was construction of a specific toll road (specific subject)).

Regardless of whether the ballot title for I-976 is general or restrictive, the initiative violates the single subject rule. The subjects of I-976 are not fairly within the ballot title and there is no rational unity among the subjects. Section 2 of I-976 expressly identifies the first, general subject of the Initiative: "State and local motor vehicle license fees may not exceed $30 per year for motor vehicles, regardless of year, value, make or model." I-976, § 2. Section 12 of I-976 contains a particularly obvious separate subject not mentioned in the ballot title: the early retirement of Sound Transit's outstanding bonds. I-976 states that "an authority that imposes a motor vehicle excise tax under RCW 81.104.160 **must** fully retire, defease, or refinance any outstanding bonds issued under this chapter" if the bonds are secured by revenue from an MVET. I-976, § 12. (emphasis added). Whereas the $30 cap on vehicle fees is a continuing, general subject, the purported attempt to force early retirement of Sound Transit's bonds is a onetime event and a specific subject. This is textbook impermissible logrolling. Moreover, in contrast to the last time this Court reviewed an initiative with an additional subject regarding the early retirement of Sound Transit's bonds, the language in I-976 is legally operative and not merely

precatory in nature. *See Pierce Cty. v. State*, 150 Wn.2d 422, 427-29, 78 P.3d 640 (2003) ("Pierce Cty. I") (finding that policy expressions about bond retirement in initiative was not a second subject for purposes of article II, section 19 because the language was "precatory."). I-976 would require that Sound Transit raise additional tax revenue and spend billions of dollars repaying bonds, a subject that is wholly separate from the subject of reducing license tab fees to $30. *See* Appendix at 697-99.

I-976 also presents additional subjects that are not germane to the other sections of I-976. For example, section 7 of I-976 eliminates the State's authority to collect tax on the retail sale of a motor vehicle under RCW 82.08.020. This is not at all germane to the subject of a limitation of vehicle taxes and fees imposed at the time of vehicle registration. Section 8 contains yet another impermissible subject requiring that the Kelley Blue Book be used as the valuation mechanism for any vehicle tax in the state. This is both irrelevant and not germane to the subject of limiting vehicle license fees to $30. These are just a few of the impermissible unrelated subjects illegally "logrolled" into one initiative, which were all set forth in Plaintiff/Respondents motion for a preliminary injunction. *See* Appendix at 40-48, 686-89.

I-976 violates the single-subject requirement of article II, section 19 on multiple grounds, and violation of the single-subject clause invalidates

I-976 in its entirety. *See, e.g., Kiga,* 144 Wn.2d at 827-28; *ATU*, 142 Wn.2d at 216. This Court should affirm the trial court on this alternative ground.

2. I-976 Unconstitutionally Amends Existing Law Under Article II, Section 37.

I-976 is also unconstitutional because it amends existing statutes without setting those amendments forth in full, in violation of article II, section 37 of the Washington Constitution. Article II, section 37 provides that, "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." The purpose of this requirement is to "avoid confusion, ambiguity, and uncertainty" by disclosing the "effect of the new legislation" and its "impact on existing laws." *ATU*, 142 Wn.2d at 245-246 (internal quotations and alterations omitted." Under the two-prong test most recently discussed in *El Centro De La Raza v. State*, 192 Wn.2d 103, 428 P.3d 1143 (2018), this Court must first consider "whether the new enactment [is] such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment." *Id*. at 129 (internal quotations omitted). Under the second prong, the Court must ask whether "a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment." *Id*.

I-976 is not a complete act and its impacts cannot be determined without review of multiple other statutes. For example, Section 6 of I-976

completely repeals RCW 82.80.140 regarding vehicle fees imposed by Transportation Benefit Districts ("TBDs"). RCW 82.80.140, in turn, states that it is subject to RCW 36.73.065, a separate authorizing statute that also vests TBDs with the power to impose vehicle license fees, as well as other taxes and fees. *See also* RCW 36.73.040 (authorizing districts to impose vehicle fees among other things). I-976 nowhere mentions RCW 36.73.040 and .065. By repealing the authority of TBDs to impose vehicle fees in RCW 82.80.140, I-976 thus eliminates those provisions from RCW 36.73.040 and .065, thereby impliedly amending those statutes without setting forth those amendments in full.

Similarly, section 2 of I-976 caps state and local vehicle fees at $30 by adding a new section to chapter 46.17 RCW. In order to give effect to this provision, I-976 must impliedly eliminate more than 15 other vehicle license fees, including various service and registration fees. *See* Appendix at 54, n.10 (identifying fees). But again, I-976 does not set forth those amendments in full, in violation of article II, section 37. Plaintiff/Respondents complete grounds for I-976's violation of article II, section 37 are set forth at Appendix at 52-55, 689-90.

This constitutional infirmity in I-976 is not severable. *ATU*, 142 Wn.2d at 256 (holding that proper remedy for a violation of article II, section 37 is invalidation of the unconstitutional enactment).

VI. THE COMPARATIVE HARMS OF A STAY PENDING APPEAL VASTLY FAVOR PLAINTIFF/RESPONDENTS.

Finally, a stay is unwarranted based on a comparison of harms. Faced with certain and overwhelming harm due to an immediate invasion of legal and equitable rights caused by certification of I-976, the State nonetheless attempts to argue that the harm is insufficient to warrant a preliminary injunction because implementation "will not create significant injuries to Respondents in the short term." Mot. at 16. The State's position, however, is based on either a distortion or misunderstanding of the standards for obtaining injunctive relief.

> The law is well settled that to obtain injunctive relief, a plaintiff must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him.

Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n, 141 Wn. App. 98, 115, 168 P.3d 443 (2007)(citing *Tyler Pipe Indus. v. Dep't of Revenue,* 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). With its focus on "short term" harm, the State improperly conflates the second and third preliminary injunction elements. In a correct application of those standards, only the invasion of legal and equitable rights must be immediate; there is no requirement of imminent harm. Unsurprisingly, the State has cited no case law supporting its contention that a party whose harm increases over time should be forced to forego a preliminary injunction and patiently

endure such harm until a permanent injunction finally issues, much less that a trial court abuses its discretion by granting a preliminary injunction based on harm that begins immediately and increases as time progresses. State's Mot. at 18. Indeed, such an argument borders on absurdity. It would be legally untenable to await, or even determine, the precise tipping point in each case such that the accumulated harm is enough for an injunction to finally go into effect.

Immediate invasion of rights: Without an injunction, the invasion of Plaintiffs constitutional rights would begin on December 5, 2019. Enactment of I-976 would immediately result in the application of an unconstitutional initiative, improperly strip entities of the ability to lawfully establish charges and taxes, and bar those same entities from the collection of lawfully enacted revenue sources. Constitutional violations are an immediate invasion of rights such that an injunction is warranted, should the other required elements be established. *See, e.g., Speelman v. Bellingham/Whatcom Cty. Hous. Authorities*, 167 Wn. App. 624, 635, 273 P.3d 1035 (2012) (holding it would be an immediate invasion of rights if Plaintiff did not receive her constitutional right to due process before the government interfered with a property interest). Similarly, initiatives that fall outside of lawful initiative power are appropriately enjoined. *See, e.g., Philadelphia II v. Gregoire*, 128 Wn.2d 707, 720, 911 P.2d 389 (1996)

(holding that an initiative which did not fall within the provisions of the state constitution for initiatives should be enjoined from the ballot).

Another immediate invasion of rights here is even more tangible. Plaintiffs and all Washingtonians have a legal and equitable right to lawful revenues in support of public transportation and projects, *absent a constitutionally compliant Initiative ending this right.* On day one of implementation, absent an injunction, the State and its agents will cease to collect current lawfully enacted vehicle registration fees and taxes, totaling approximately $358 million annually and including about $58 million in local VLF currently collected by 62 localities. Mot. at 4. The State does not and cannot deny this substantial loss of revenue, which results only if an unconstitutional I-976 is allowed to take effect.

Actual and Substantial Injury: The State's analysis notwithstanding, harm is properly evaluated based on whether it is "actual and substantial" and may either be present or future harm ("resulting or will result"). *Tyler Pipe* at 792. Here, there is both an immediate and permanent loss of incoming revenue and a future breakdown in the transit and transportation systems state-wide due to this unconstitutional initiative.

The State inexplicably argues that there is no harm in enforcing an unconstitutional initiative because the harm of overwhelming systemic collapse of transportation and transit will not come quickly enough, there are unspecified, extra funds available that can purportedly be used to

supplement the loss of incoming revenue in the short-term, and that fast resolution of this legal dispute is a foregone conclusion. Mot. at 16-18. Not one of these premises is accurate.

Moreover, three things must be said in response. First, there is no requirement for "immediate harm." Second, as the trial court found, Plaintiffs will face "immediate, irreparable harms" if I-976 is allowed to take effect.[8] App. 832 (Prelim. Inj. Order Finding of Fact ("FOF") 3. The City of Seattle alone will lose $2.68 million in revenue by New Year's if I-976 takes effect. App. 833, FOF 3(b). King County Metro must cut 110,000 service hours by December 9, 2019 if the initiative takes effect that cannot be restored until September 2020 at the earliest. App. 832, FOF 3(a).

Third, while the State apparently combed through the City of Seattle's finances to identify existing revenue which it then speculates could be used to fund transit services, there is simply no legal support for the contention that an entity must be faced with insolvency to establish harm. If the existing revenue funds one program, logically, it cannot fund another. If a reserve is spent, then the harm becomes that the City no longer has a reserve. The harm shifts focus depending on how revenues are reallocated, but absent an injunction, harm landing somewhere is inevitable. The

[8] As noted above, the State makes no effort to challenge the underlying sufficiency of the evidence for these finding of fact and they are verities for purposes of this motion. At best, the State mischaracterizes the trial court's findings, but this is of no moment because the findings speak for themselves.

Gannon supplemental declaration emphasizes this issue with respect to King County:

> Metro is not in a position to use its own budget and resources to backfill the loss of 100,000 service hours that Seattle is currently funding. The only way Metro could backfill the loss of Seattle's supplemental service would be to take away from its own regular service or use capital funds. Taking service from non-Seattle routes would simply shift the loss of service elsewhere. And using capital funds to pay for operations would mean that those dollars would be gone forever, and could never be invested in transportation infrastructure.

App. 705. Moreover, the State never mentions the King declaration in its briefing, and thus ignores localities across the state that are facing imminent and significant harms (including inability to service existing debt without the resources to shift), even if this reallocation approach were legally required, which it is not.

Implementation of I-976 blocks incoming revenue, which is rightfully anticipated and will be permanently lost, to Seattle and 61 other localities. This revenue cannot be replaced and is forever lost to its intended, public uses. This is a textbook example of irreparable harm. **Once the revenue goes uncollected, there is no way to collect it later**. **The State has never once disputed this contention.**[9] This permanent loss of revenue is an actual and substantial harm, which has both immediate implications and what the trial court repeatedly referred to as "downstream impacts," as

[9] Certainly, at the conclusion of these proceedings, the State will pay no damages to Plaintiffs that were injured by an unconstitutional I-976.

Washington's transportation and transit programs shrink as the revenue crisis grows and deepens over time. The catastrophic cuts to municipal services state-wide -- from 110,000 service hours of King County Metro (which equates to 82 FTE employees) to the inability of municipalities to pay for basic services such as street lights – go far beyond mere inconvenience. FOF 3a; App. 832; App. 105; App. 177-180.

Finally, the balancing of equities strongly favors maintaining the status quo through the injunction ordered by the trial court. The State's discussion of the balancing of equities in this case stands in direct contrast to how the State has presented the same issues to the judiciary on other occasions. Public interest always favors "preventing the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). The State quoted and embraced this concept in its brief. Dec. of Eldred, Ex. B at p. 28. Clearly, a violation of constitutional rights cannot be tolerated whether by President Trump or the State through its enforcement of I-976.

Similarly, the State argues that to enjoin I-976 is to thwart the will of the people, a serious harm. Case law does not support this contention. "In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature when enacting a statute. *Wash. Fed'n of State Employees v. State,* 127 Wn.2d 544, 556, 901 P.2d 1028 (1995). This power is subject to the same constitutional restraints placed upon the Legislature

when making laws. *State ex rel. Heavey v. Murphy,* 138 Wn.2d 800, 808, 982 P.2d 611 (1999). Consequently, even though an initiative passes by the majority of the voters, it will be struck down if it runs afoul of Washington's constitution." *City of Burien v. Kiga*, 144 Wn.2d 819, 824, 31 P.3d 659 (2001). *See also Port of Tacoma v. Save Tacoma Water*, 422 P.3d 917, 925 (Wash. Ct. App. 2018), *review denied,* 192 Wn.2d 1026, 435 P.3d 267 (2019), and *cert. denied,* 140 S. Ct. 106 (2019) (No federal or state first amendment right to put an invalid initiative on the ballot). In short, when an initiative is unconstitutional, there is no "will of the people" to support. To the contrary, above all else, the constitution itself represents the will of the people and an imperative to protect rights guaranteed by the constitution.

The State argues that "Washington voters have a strong interest in not being forced to pay the fees, taxes and charges they just rejected." Mot. at 15. However, there are two problems with this analysis. First, no one in Washington has any interest, much less a "strong interest," in the enforcement of an unconstitutional initiative. Second, case law actually rejects the concept of a "strong interest" in avoiding taxes pending a dispute. Both the Washington and U.S. Supreme Courts have referred to the payment of taxes which are under dispute in a legal proceeding as a "mere inconvenience" rather than actual and substantial injury. *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wash. 2d 785, 795, 638 P.2d 1213, 1218

(1982)(quoting California v. Latimer, 305 U.S. 255, 262, 59 S.Ct. 166,169 (1938). In balancing the equities in determining whether or not to enter an injunction, courts also consider ""[s]ociety's strong interest in the collection of taxes." *Tyler Pipe Indus., Inc*., 96 Wn.2d at 796. That strong interest is present here.

The State admits there is a viable refund process (*see* Price Declaration, Mot. at 17) and ignores the impossibility of after-the-fact revenue collection. Such a process has been used following other unsuccessful initiative challenges and is mandated by statute. S*ee* RCW 46.68.010(1) ("A person who has paid all or part of a vehicle license fee under this title is entitled to a refund if the amount was paid in error…"); RCW 4.68.010(2) ("The department [of licensing] shall refund overpayments of vehicle license fees and motor vehicle excise taxes under Title 82 RCW that are ten dollars or more. A request for a refund is not required.") (emphasis added). The State tries to inflate the costs of a refund procedure. Even if it were necessary to employ 42 additional short term employees and check each refund three times, these potential administrative costs are dwarfed by the real and immediate costs that would be imposed on Plaintiffs should I-976 take effect. For example, Metro alone would lose the equivalent of 82 *full-time* employees – more than double the contingent harm claimed by the State. The overall revenue loss to Plaintiffs and others in the state runs in the hundreds of millions of dollars, which is well under

what it might cost the State to initiate computerized refunds should I-976 be eventually upheld. Moreover, Washington residents would have their money returned to them after a period of time if warranted, the reverse would not be true. Utilizing the State's figures, nearly $400 million in revenue would be lost annually absent an injunction, **and never recovered**.

The trial court did not abuse its discretion in finding both an immediate invasion of Plaintiffs' rights, and actual and substantial harm. For purposes of RAP 8.1(b)(3), this is not a debatable issue, and the record also demonstrates that the harm to Plaintiffs is substantially greater than the alleged harm to the State absent a stay.

Finally, the State claims to speak for the people, but harm to Plaintiffs is public harm. Nearly all Plaintiffs are public municipal corporations that use licensing fees and other taxes to fund important, and often crucial, public infrastructure. Even with the misleading, logrolling, and confusing I-976 ballot title, 47% of voters rejected the initiative. All Washingtonians have the right to demand compliance with our constitution, regardless of the vote count.

VII. CONCLUSION

For the foregoing reasons, this Court should deny the State's Emergency Motion for Stay Pending Review.

DATED this 3rd day of December, 2019.

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CERTIFICATE OF FILING AND SERVICE

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of December, 2019 at Seattle, Washington.

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Respondent/Plaintiffs' Response to State's Emergency Motion for Stay Pending Review

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